

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BILL A. DANLEY,	)	
	)	No. CV-10-0284-JPH
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on November 18, 2011. (ECF No. 17, 19). Attorney Maureen J. Rosette represents the Plaintiff, Mr. Bill A. Danley; Special Assistant United States Attorney Richard M. Rodriguez represents the Commissioner of Social Security, Mr. Michael J. Astrue ("Commissioner"). The parties have consented to proceed before a magistrate judge. (ECF No. 7). After reviewing the administrative record and the briefs filed by the parties, the court **grants** Defendant's Motion for Summary Judgment (ECF No. 19) and **denies** Plaintiff's Motion for Summary Judgment (ECF No. 17).

**JURISDICTION**

Mr. Danley filed an application for disability insurance benefits (DIB) and an application for supplemental security income (SSI) on August 7, 2008. (Tr. 142-157). Mr. Danley alleged his

1 disability began January 1, 2004 (Tr. 142-57), and later amended  
2 his onset date to May 1, 2005 (Tr. 39). The applications were  
3 denied initially and on reconsideration. (Tr. 85-97). Mr.  
4 Danley requested a hearing on April 15, 2009. (Tr. 98-99).

5 At a hearing before Administrative Law Judge (ALJ) Robert S.  
6 Chester on January 21, 2010, Mr. Danley, represented by counsel; a  
7 vocational expert, Mr. Daniel R. McKinney, Sr.; and a medical  
8 expert, Dr. Billy Allen Haynes, testified. (Tr. 35-82, 135). On  
9 February 12, 2010, the ALJ issued an unfavorable decision. (Tr.  
10 10-27). The Appeals Council denied a request for review on July  
11 27, 2010. (Tr. 1-3). Therefore, the ALJ's decision became the  
12 final decision of the Commissioner, which is appealable to the  
13 district court pursuant to 42 U.S.C. § 405(g). Mr. Danley filed  
14 this action for judicial review pursuant to 42 U.S.C. § 405(g) on  
15 August 27, 2010. (ECF No. 4).

#### 16 STATEMENT OF FACTS

17 The facts have been presented in the administrative hearing  
18 transcripts, the ALJ's decision, the briefs of both Plaintiff and  
19 the Commissioner, and are summarized here.

20 Mr. Danley was 49 years old at the time of the ALJ's  
21 decision. (Tr. 25, 27). He has a GED. (Tr. 55, 609). Mr.  
22 Danley has past work as a lumber yard worker, molder operator,  
23 feeder, warehouse worker, material handler, punch press operator,  
24 and truck driver. (Tr. 25, 55-58, 109).

25 Although Mr. Danley suffers from a variety of severe  
26 impairments (Tr. 15), of particular import is the severity of his  
27 epilepsy. Mr. Danley's first documented seizure occurred while he  
28 was at work in December 2003. (Tr. 433). Since December 2003,

1 Mr. Danley has been seen and treated for his epilepsy, and its  
2 corresponding seizures, at no less than nine different facilities,  
3 all with different practitioners. While under the care of each of  
4 these practitioners, Mr. Danley gave varying descriptions  
5 regarding the frequency with which he experienced seizures and  
6 complied with prescribed medications.

#### 7 SEQUENTIAL EVALUATION PROCESS

8 The Social Security Act (the "Act") defines "disability"  
9 as the "inability to engage in any substantial gainful activity by  
10 reason of any medically determinable physical or mental impairment  
11 which can be expected to result in death or which has lasted or  
12 can be expected to last for a continuous period of not less than  
13 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
14 Act also provides a Plaintiff shall be determined to be under a  
15 disability only if any impairments are of such severity that a  
16 plaintiff is not only unable to do previous work but cannot,  
17 considering plaintiff's age, education and work experiences,  
18 engage in any other substantial gainful work which exists in the  
19 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
20 Thus, the definition of disability consists of both medical and  
21 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
22 (9<sup>th</sup> Cir. 2001).

23 The Commissioner has established a five-step sequential  
24 evaluation process for determining whether a person is disabled.  
25 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
26 is engaged in substantial gainful activities. If so, benefits are  
27 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
28 not, the decision maker proceeds to step two, which determines

1 whether plaintiff has a medically severe impairment or combination  
2 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)  
3 (ii).

4 If plaintiff does not have a severe impairment or combination  
5 of impairments, the disability claim is denied. If the impairment  
6 is severe, the evaluation proceeds to the third step, which  
7 compares plaintiff's impairment with a number of listed  
8 impairments acknowledged by the Commissioner to be so severe as to  
9 preclude substantial gainful activity. 20 C.F.R. §§  
10 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
11 App. 1. If the impairment meets or equals one of the listed  
12 impairments, plaintiff is conclusively presumed to be disabled.  
13 If the impairment is not one conclusively presumed to be  
14 disabling, the evaluation proceeds to the fourth step, which  
15 determines whether the impairment prevents plaintiff from  
16 performing work which was performed in the past. If a plaintiff  
17 is able to perform previous work, that Plaintiff is deemed not  
18 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
19 this step, plaintiff's residual functional capacity ("RFC")  
20 assessment is considered. If plaintiff cannot perform this work,  
21 the fifth and final step in the process determines whether  
22 plaintiff is able to perform other work in the national economy in  
23 view of plaintiff's residual functional capacity, age, education  
24 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
25 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

26 The initial burden of proof rests upon the plaintiff to  
27 establish a *prima facie* case of entitlement to disability  
28 benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971);

1 *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial  
2 burden is met once the plaintiff establishes a physical or mental  
3 impairment prevents the performance of previous work. The burden  
4 then shifts, at step five, to the Commissioner to show: (1)  
5 plaintiff can perform other substantial gainful activity and (2) a  
6 "significant number of jobs exist in the national economy" which  
7 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
8 Cir. 1984).

9 **STANDARD OF REVIEW**

10 Congress has provided a limited scope of judicial review of a  
11 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
12 the Commissioner's decision, made through an ALJ, when the  
13 determination is not based on legal error and is supported by  
14 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995  
15 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
16 1999). "The [Commissioner's] determination that a plaintiff is  
17 not disabled will be upheld if the findings of fact are supported  
18 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
19 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence  
20 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
21 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
22 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
23 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
24 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
25 evidence as a reasonable mind might accept as adequate to support  
26 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
27 (citations omitted). "[S]uch inferences and conclusions as the  
28 [Commissioner] may reasonably draw from the evidence" will also be

1 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On  
2 review, the Court considers the record as a whole, not just the  
3 evidence supporting the decision of the Commissioner. *Weetman v.*  
4 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v.*  
5 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

6 It is the role of the trier of fact, not this Court, to  
7 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
8 evidence supports more than one rational interpretation, the Court  
9 may not substitute its judgment for that of the Commissioner.  
10 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
11 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
12 substantial evidence will still be set aside if the proper legal  
13 standards were not applied in weighing the evidence and making the  
14 decision. *Browner v. Secretary of Health and Human Services*, 839  
15 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
16 evidence to support the administrative findings, or if there is  
17 conflicting evidence that will support a finding of either  
18 disability or nondisability, the finding of the Commissioner is  
19 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
20 1987).

#### 21 ALJ'S FINDINGS

22 At the outset, the ALJ found Mr. Danley met the insured  
23 status requirements of the Social Security Act through September  
24 30, 2006. (Tr. 15). At step one, the ALJ found Mr. Danley had  
25 not engaged in any substantial gainful activity since May 1, 2005,  
26 Mr. Danley's amended onset date. (Tr. 15). At step two, the ALJ  
27 found Mr. Danley suffers from the following severe impairments:  
28 status-post cervical fusion and discectomy, status-post carpal

1 tunnel release surgery, hepatitis C, degenerative disk disease,  
2 sleep apnea, headaches, hypoglycemia, hypertension, depressive  
3 disorder, erosive gastritis, cervical dystonia, post-traumatic  
4 epilepsy, and obesity. (Tr. 15).

5 At step three, the ALJ determined, although Mr. Danley  
6 suffers from severe impairments, Mr. Danley's impairments do not  
7 alone or in combination meet or medically equal a Listing  
8 impairment. (Tr. 16). The ALJ considered the following Listings:  
9 1.04 (Disorders of the Spine); 11.00 (Neurological); 14.00 (Immune  
10 System Disorder); 4.00 (Cardiovascular); 3.10 (Sleep-related  
11 Breathing Disorders); and 5.00 (Digestive). (Tr. 16). Regarding  
12 Mr. Danley's disability under Listing 11.00, the ALJ discussed Mr.  
13 Danley's medical history and the testimony of the medical expert,  
14 Dr. Haynes. (Tr. 17). The ALJ specifically discussed the  
15 requirement under Listing 11.00 that the plaintiff must have  
16 epileptic seizures more than once a month despite at least three  
17 months of compliance with prescribed anti-epileptic treatment.  
18 (Tr. 16; 20 C.F.R. Pt. 404, Subpt. P App. 1, §11.02, §11.03).  
19 Regarding this requirement, the ALJ noted Mr. Danley's medical  
20 records indicate compliance with his anti-epileptic medication was  
21 a re-occurring problem. (Tr. 17). Alternatively, the ALJ noted  
22 Mr. Danley's medical records indicate his seizures occur with less  
23 frequency than the Listing requires. (Tr. 17). Finally, the ALJ  
24 found Mr. Danley less than completely credible because his  
25 testimony and reports to medical sources regarding the frequency  
26 of his seizures and compliance with his prescribed medication  
27 contradicted one another. (Tr. 17).

28 In anticipation of step four, relying on the VE and analyzing

1 all of Mr. Danley's medical conditions, the ALJ found Mr. Danley  
2 has the residual functional capacity to perform light work. (Tr.  
3 19-24). At step four, the ALJ found Mr. Danley was unable to  
4 perform any past relevant work. (Tr. 25). At step five, relying  
5 on the VE and analyzing Mr. Danley's age, education, work  
6 experience and residual functional capacity, the ALJ determined  
7 there are jobs that exist in significant numbers in the both  
8 national and regional economies that Mr. Danley can perform. (Tr.  
9 24). Accordingly, the ALJ found Mr. Danley is not disabled as  
10 defined by the Social Security Act. (Tr. 24).

#### 11 ISSUES

12 Mr. Danley alleges the ALJ erred on step three of the  
13 sequential evaluation process when he determined Mr. Danley did  
14 not meet the requirements of Listing 11.02 or 11.03 for epilepsy.  
15 (ECF No. at 10-18). Alternatively, Mr. Danley alleges the ALJ  
16 erred in step five of the sequential evaluation process when he  
17 determined Mr. Danley could perform work that exists in the  
18 national economy. (ECF No. 18 at 10-18). In support of these  
19 contentions, Mr. Danley alleges the ALJ erred when he weighed the  
20 opinions of Mr. Danley's 'treating sources' and when he assessed  
21 Mr. Danley's credibility. (ECF No. 18 at 10-18). In response,  
22 the Commissioner asserts the Court should affirm the ALJ's  
23 decision because it applied correct legal standards and is  
24 supported by substantial evidence. (ECF No. 20 at 2).

#### 25 DISCUSSION

26 In social security proceedings, the claimant must prove the  
27 existence of a physical or mental impairment by providing medical  
28 evidence consisting of signs, symptoms, and laboratory findings;



1 the claimant's own statement of symptoms alone will not suffice.  
2 20 C.F.R. § 416.908. Sources who can provide the underlying  
3 evidence to establish an impairment are limited. 20 C.F.R. §  
4 416.913. Acceptable medical sources are: licensed physicians;  
5 licensed or certified psychologists; licensed optometrists;  
6 licensed podiatrists; and qualified speech-language pathologists.  
7 20 C.F.R. § 416.913(a)(1-5). One form of medical evidence that  
8 can contribute to proving the existence of a physical or mental  
9 impairment is a medical opinion. Medical opinions are statements  
10 from physicians, psychologists or other acceptable medical sources  
11 that reflect judgments about the nature and severity of the  
12 claimant's impairment(s), including the claimant's symptoms,  
13 diagnosis and prognosis, what the claimant can still do despite  
14 impairment(s), and the claimant's physical or mental restrictions.  
15 20 C.F.R. § 404.1527.

16 A treating physician's medical opinion is given special  
17 weight because of familiarity with the claimant and the claimant's  
18 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9<sup>th</sup> Cir.  
19 1989). A treating physician's opinion is not "necessarily  
20 conclusive as to either a physical condition or the ultimate issue  
21 of disability." *Magallanes v. Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir.  
22 1989) (citations omitted). More weight is given to a treating  
23 physician than an examining physician. *Lester v. Chater*, 81 F.3d  
24 821, 830 (9<sup>th</sup> Cir. 1995). Correspondingly, more weight is given  
25 to the opinions of treating and examining physicians than to  
26 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592  
27 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's  
28 opinions are not contradicted, they can be rejected only with

1 clear and convincing reasons. *Lester*, 81 F. 3d at 830. If  
2 contradicted, the ALJ may reject an opinion if he states specific,  
3 legitimate reasons that are supported by substantial evidence.  
4 See *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1435,  
5 1463 (9<sup>th</sup> Cir. 1995).

6 In addition to the testimony of a nonexamining medical  
7 advisor, the ALJ must have other evidence to support a decision to  
8 reject the opinion of a treating physician, such as laboratory  
9 test results, contrary reports from examining physicians, and  
10 testimony from the claimant that was inconsistent with the  
11 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
12 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
13 Cir. 1995). Finally, in addition to evidence from the  
14 aforementioned acceptable medical sources, a claimant may also use  
15 evidence from other sources to show the severity of his or her  
16 impairment(s) and how it affects the claimant's ability to work.  
17 20 C.F.R. § 416.913(d). Others sources include, but are not  
18 limited to, nurse-practitioners, physicians' assistants,  
19 chiropractors, and therapists. 20 C.F.R. § 416.913(d). Non-  
20 accepted medical source opinions are treated like lay opinions.  
21 See *Lewis v. Apfel*, 236 F.3d 503 (9th Cir. 2001). The ALJ may  
22 either reject or give less weight to lay opinions if he or she  
23 gives reasons germane for doing so. *Lewis v. Apfel*, 236 F.3d 503  
24 (9th Cir. 2001).

25 **A. Listing for Epilepsy (11.02 or 11.03)**

26 Mr. Danley alleges the ALJ erred on step three of the  
27 sequential evaluation process when he determined Mr. Danley did  
28 not meet the requirements of Listing 11.02 or 11.03 for epilepsy.

1 (ECF No. 18 at 10-18). Specifically, Mr. Danley alleges the ALJ  
2 erred by failing to properly weigh the opinions of his treating  
3 sources from Rockwood Neurology: Dr. Powell and Amy Gregg PA-C.  
4 (ECF No. 18 at 12, 1-2; at 14, 17-19). Mr. Danley asserts both  
5 Dr. Powell and Ms. Gregg are treating sources whose medical  
6 opinions are entitled to controlling weight. Hence, the ALJ erred  
7 by not "set[ting] forth the requisite reasons for rejecting Mr.  
8 Danley's treating physician's opinions." *Id.* Additionally, Mr.  
9 Danley asserts the ALJ erred when assessing Mr. Danley's  
10 credibility and correspondingly not giving substantial weight to  
11 Mr. Danley's own testimony regarding the frequency and severity of  
12 his seizures. (ECF No. 18 at 10-18).

13 In order to meet the requirements of Listing 11.02, the  
14 plaintiff must have epileptic seizures more than once a month  
15 despite at least three months of compliance with prescribed anti-  
16 epileptic treatment. (Tr. 16; 20 C.F.R. Pt. 404, Subpt. P App. 1,  
17 §11.02, §11.03). According to social security regulations,  
18 adherence to prescribed anti-epileptic therapy can ordinarily be  
19 determined from objective clinical findings: "Blood drug levels  
20 should be evaluated in conjunction with all the other evidence to  
21 determine the extent of compliance." 20 C.F.R. Pt. 404, Subpt. P  
22 App. 1 §11.00(a).

23 In Mr. Danley's case, the ALJ based his opinion regarding  
24 whether Mr. Danley met or medically equaled Listing 11.02 and  
25 11.03 on two separate grounds: first, Mr. Danley has not complied  
26 with prescribed anti-epileptic treatment; and, alternatively, Mr.  
27 Danley's seizures do not occur with the requisite frequency. (Tr.  
28 16). Regarding weighing opinion evidence, the ALJ stated he

1 "assigned significant weight to acceptable medical sources  
2 opinions while discounting non-accepted medical opinions where  
3 appropriate." (Tr. 25).

4 I. Compliance with prescribed seizure medications

5 Mr. Danley contends he has been sufficiently compliant with  
6 his medications so as to meet the requirements of Listing 11.02.  
7 In support of this Mr. Danley primarily points to a post  
8 administrative hearing letter from Ms. Gregg dated January 29,  
9 2010. (ECF No. 18 at 12-16; Tr. 892). This letter was submitted  
10 as evidence by Mr. Danley's attorney sometime between February 2,  
11 2010, and when the ALJ issued his opinion on February 12, 2010.  
12 (Tr. 27, 892). In this letter, Ms. Gregg states the "best [she]  
13 can tell from reviewing his records" Mr. Danley "appears to have  
14 approximately one seizure per month while on Depakote", and he  
15 "seems to have been" compliant with his medications since August  
16 2009. (Tr. 892).

17 Mr. Danley contends Ms. Gregg is a treating source whose  
18 medical opinion in the January 29, 2010, letter regarding his  
19 recent compliance with prescribed medications is entitled to  
20 controlling weight. Mr. Danley correctly points out that nowhere  
21 in the ALJ's opinion is the January 29, 2010, letter from Ms.  
22 Gregg noted or otherwise directly addressed. For this reason, Mr.  
23 Danley concludes the ALJ did not "set forth the requisite reasons  
24 for rejecting Mr. Danley's treating physician's opinions" and the  
25 decision must be reversed (ECF No. 18 at 12, 1-2).

26 *a. Ms. Amy Gregg PA-C as a "treating source"*

27 As stated above, the Code of Federal Regulations  
28 distinguishes between those opinions coming from "acceptable

1 medical sources" and those coming from "other sources." 20 C.F.R.  
2 §§ 404.1527, 416.913. Likewise, the Code of Federal Regulations  
3 permits the ALJ to accord opinions from other sources less weight  
4 than opinions from acceptable medical sources. *Id.* Typically,  
5 the opinion of a nurse practitioner is an "other source" which the  
6 ALJ may accord less weight than acceptable medical sources. 20  
7 C.F.R. § 416.913. However, the opinion of a nurse practitioner may  
8 constitute a treating source when a nurse practitioner works so  
9 closely with a treating physician that the nurse practitioner is  
10 merely acting as the agent of that treating physician. *Gomez v.*  
11 *Chater*, 74 F.3d 967 (9<sup>th</sup> Cir. 1996) (holding an ALJ was entitled to  
12 give controlling weight to the opinion of a treating nurse  
13 practitioner who worked closely under the supervision of a  
14 treating physician).<sup>1</sup>

15 The January 29, 2010, letter from Nurse Practitioner Amy  
16 Gregg is not entitled to controlling weight because Ms. Gregg was  
17 not acting as an agent of Dr. Powell. Nowhere in the January 29,  
18 2010, letter does Ms. Gregg mention Dr. Powell. Actually, Ms.  
19 Gregg qualified her assertions as her own by stating: the "best  
20 [she] can tell from reviewing his records" Mr. Danley "appears to  
21 have approximately one seizure per month while on Depakote", and  
22 he "seems to have been" compliant with his medications since  
23 August 2009 when *she* had a long discussion with Mr. Danley and *she*

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25 <sup>1</sup>*Gomez* also states the opinion of a nurse practitioner may  
26 constitute an acceptable medical source entitled to  
27 controlling weight if the nurse practitioner is a member  
28 of an interdisciplinary team. However, that exception was  
grounded in 20 C.F.R. § 416.927(a)(6) and (e)(3) which  
have since been deleted. See 45 Fed. Reg. 55584, as  
amended at 65 Fed. Reg. 34950.

1 explained the severe danger noncompliance with his medication  
2 placed him in. Hence, it is clear from the face of the January  
3 29, 2010, letter that Ms. Gregg was not merely acting as an agent  
4 of Dr. Powell.

5 *b. Support for the ALJ's noncompliance determination*

6 As Ms. Gregg is not a treating source, it is within the  
7 discretion of the ALJ to discount her statements. Although the  
8 ALJ did not specifically address the January 29, 2010, letter in  
9 his opinion, there are several reasons Ms. Gregg's statements  
10 regarding Mr. Danley's recent compliance with his medications were  
11 appropriately discounted. In his opinion, the ALJ correctly noted  
12 Mr. Danley's compliance with his medication was at issue. (Tr.  
13 16). In support of this conclusion, the ALJ referenced and  
14 incorporated the testimony of the medical examiner and identified  
15 several instances in the record of non-compliance.

16 At the hearing, the medical examiner, Dr. Haynes, testified  
17 "[he] think[s] there's a lot of noncompliance." (Tr. 42). Dr.  
18 Haynes then went on to explain Mr. Danley's neurologists "have  
19 been trying valiantly to find a medication." (Tr. 42). However,  
20 Mr. Danley takes his medication "for a couple of days, can't stand  
21 it; next one for another couple of days, can't deal with it, etc."  
22 (Tr. 42). Dr. Haynes also noted Mr. Danley has a history of non-  
23 compliance through overuse: "...there were a couple of  
24 hospitalizations for the Fiorinal and the Fioricet which has  
25 sedative compounds putting him into the hospital. So I just don't  
26 think that he meets the seizure listing on compliant grounds."  
27 (Tr. 43-44). Following this statement by Dr. Haynes, the ALJ  
28

1 noted: "It looked to me like at some point the testing was showing  
2 that his Depakote in his system was a lot lower than they would  
3 have expected." (Tr. 44). Dr. Haynes confirmed the ALJ's reading  
4 of the medical record by stating: "Yeah, that, that's one way to  
5 check on compliance, and that's, that's sort of a black mark I  
6 guess you would say." (Tr. 44). Finally, when asked by Mr.  
7 Danley's attorney if Mr. Danley's seizures occurred with  
8 sufficient frequency would he meet the listing at 11.02, Dr.  
9 Haynes responded: "If that were true.. that would meet a listing.  
10 Although, I haven't seen a recent Depakote level to document that  
11 so I'd have to put a proviso in there..." (Tr. 53).

12 In addition to the testimony of the medical examiner, the ALJ  
13 identified a pattern of Mr. Danley's non-compliance with both his  
14 seizure medications and other medications. With regards to non-  
15 compliance with his seizure medications the ALJ made several  
16 important observations from the medical record. First, the ALJ  
17 noted "[t]wo months before the claimant's amended alleged onset  
18 date, medical sources at the Department of Corrections noted the  
19 claimant had been non-compliant in taking his anti-convulsive  
20 medication." (Tr. 20, referring to Exhibit 2F). The ALJ went on  
21 to note in August 2008, the "claimant reported that he had been  
22 previously treated with carbamazepine for seizures but stopped  
23 taking it a week earlier because he felt "spaced out." (Tr. 23,  
24 referring to Exhibit 19F). The ALJ also summarized a few of the  
25 many anti-epileptic prescriptions Mr. Danley has refused to comply  
26 with for more than a few days:

27 Ms. Gregg prescribed Zonegran for his seizures, but the  
28 claimant returned four days later and stated that he

1 could not tolerate it as it made him feel agitated and  
2 aggressive. Ms. Gregg changed his medication to  
3 Topamax, but the claimant informed her in January 2009  
4 that he could not tolerate it either. Ms. Gregg opined  
that the claimant needed to choose whether seizure  
control or avoidance of side effects was most important  
to him.

5 (Tr. 23, referring to Exhibit 31F) (internal citations omitted).  
6 The ALJ concluded his review of Mr. Danley's compliance issues by  
7 noting "[i]n August 2009, the claimant reported to Amy Gregg, PA-  
8 C, that he had stopped taking Depakote..." (Tr. 23).

9 In addition, the ALJ also noted several instances of non-  
10 compliance with other medications including: not taking prescribed  
11 hydrocodone in June 2007; not taking prescribed anti-hypertensive  
12 medications in July 2007; and overdosing on prescribed Fioricent  
13 in January and May of 2007. (Tr. 21-23, referring to Exhibit 8F,  
14 13F). Although not specifically addressed by the ALJ, this court  
15 also notes Ms. Gregg's statement is not supported by medically  
16 acceptable clinical and laboratory diagnostic findings or by any  
17 significant record.

18 In summary, the ALJ's determination that Mr. Danley does not  
19 meet the requirements of Listing at 11.02 because he has not been  
20 compliant with his prescribed medications is supported by  
21 substantial evidence. Likewise, Ms. Gregg's opinion was given  
22 appropriate weight because it was vague, unexplained, and, most  
23 importantly, contradicted by medical evidence.

24 II. Frequency of Mr. Danley's Seizures

25 Alternatively, the ALJ determined "[r]egardless, the medical  
26 records indicate that the claimant's seizures occur, at most, once  
27 every two months. On that basis alone, his epilepsy does not meet  
28



1 or medically equal listing 11.02 or 11.03." (Tr. 16).

2 Accordingly, Mr. Danley simultaneously alleges the ALJ erred in  
3 determining his seizures do not occur with the requisite frequency  
4 under Listing 11.02. (ECF No. 18 at 12-16; Tr. 16). Similarly to  
5 his compliance claim, Mr. Danley primarily points to the post  
6 administrative hearing letter from Ms. Gregg dated January 29,  
7 2010, as support for his position. (ECF No. 18 at 12-16; Tr. 892).  
8 In relevant portion, Ms. Gregg stated: the "best [she] can tell  
9 from reviewing his records" Mr. Danley "appears to have  
10 approximately one seizure per month while on Depakote." (Tr. 892).

11 *a. Support for the ALJ's frequency determination*

12 As explained above, Ms. Gregg is not an acceptable medical  
13 source; hence, it is within the discretion of the ALJ to discount  
14 her statements. Although the ALJ did not specifically address the  
15 January 29, 2010, letter, there are several reasons Ms. Gregg's  
16 statements regarding the frequency of Mr. Danley's seizures were  
17 appropriately discounted. The ALJ's determination that Mr. Danley  
18 does not meet the requirements of Listing 11.02 because his  
19 seizures do not occur with the requisite frequency is supported by  
20 substantial evidence. In support of this conclusion, the ALJ  
21 incorporated and referenced the testimony of the medical examiner  
22 and identified a long history of variable reporting by Mr. Danley  
23 regarding the frequency of his seizures. (Tr. 16-26).

24 Mr. Danley's medical records demonstrate he has a long  
25 history of variable reporting regarding the frequency of his  
26 seizures. For completeness sake, Mr. Danley's entire history of  
27 variable reporting is documented below, with a parallel citation  
28

1 following each report that indicates if and where it was noted by  
2 the ALJ in his opinion or the medical examiner in his testimony.

- 3 • December 2003: Mr. Danley's first documented seizure. (Tr.  
4 433; Tr. 13, referring to Exhibit 5E).
- 5 • March 2005: Department of Corrections medical staff noted Mr.  
6 Danley stopped taking his prescribed medications because he  
7 "had not had a problem in 8 months." (Tr. 268; Tr. 13,  
8 referring to Exhibit 2F; Tr. 52).
- 9 • February 2007: Ms. Sandra Forsman, a nurse practitioner,  
10 noted Mr. Danley claimed his last seizure was in December  
11 2006. (Tr. 353; Tr. 21-22 referring to Exhibit 8F).
- 12 • April 2007: Dr. Cynthia Hahn noted Mr. Danley's "seizures  
13 have been increasing in frequency, now occurring every 6  
14 months." (Tr. 292, 294; Tr. 15, referring to Exhibit 4F).
- 15 • June 2007: Dr. Amna T. Ahmed noted Mr. Danley "states that in  
16 the last six months he has had one witnessed episode of  
17 seizure at Fred Meyer." (Tr. 512).
- 18 • November 20, 2007: Dr. Maria Janout noted "Bill states that he  
19 is 'doing alright'. He has not had any loss of consciousness  
20 or seizures since his last office visit" on October 9, 2007.  
21 (Tr. 489, 490, 492).
- 22 • February 2008: Dr. Janout noted Mr. Danley "has had no  
23 seizure episodes." (Tr. 488)
- 24 • February 2008: Ms. Forsman noted Mr. Danley had no seizure  
25 activity for the last six months. (Tr. 326; Tr. 22,  
26 referring to Exhibit 8F).
- 27 • August 2008: Staff at the Deaconess Medical Center Emergency  
28

1 room noted Mr. Danley had up to four seizures, two of which  
2 were witnessed and recorded in the emergency room. (Tr. 568-  
3 574; Tr. 23, referring to Exhibit 19F).

4 • August 2008: Mr. Danley reported, on a seizure questionnaire,  
5 he has seizures about once every four months. (Tr. 189; Tr.  
6 19, referring to Exhibit 5E).

7 • October 2008: Dr. Powell noted typically Mr. Danley has  
8 seizures once every 3-4 months, and his most recent seizure  
9 was in August 2008. (Tr. 600; Tr. 23, referring to Exhibit  
10 22F; Tr. 46 referring to Exhibit 22F).

11 • November 2008: Dr. Robert Capes noted Mr. Danley's last  
12 seizure was in August of 2008. (Tr. 608; Tr. 23, referring  
13 to Exhibit 35F).

14 • November 2008: Ms. Amy Gregg PA-C noted Mr. Danley believes  
15 his seizures occur once every three to four months; however  
16 his fiancé believes they occur about once every two months.  
17 (Tr. 738; Tr. 13, referring to Exhibit 31F; Tr. 43-44).

18 • January 2009: Valley Hospital and Medical Center ER staff  
19 noted Mr. Danley has a history of seizures but has not had  
20 one since July 2008. (Tr. 730).

21 • January 2009: Ms. Amy Gregg PA-C noted Mr. Danley complained  
22 of an aura the night before. (Tr. 733).

23 • April 2009: Dr. Powell noted Mr. Danley said he had two  
24 "possible borderline seizures" per week. Mr. Danley  
25 clarified that by "borderline seizure" he meant he was  
26 flushed or confused for 10-15 minutes at a time, but never  
27 lost consciousness. (Tr. 834; Tr. 23, referring to Exhibit  
28

1 40F).

- 2 • June 2009: Dr. Manek noted Mr. Danley has seizures "often,  
3 maybe once every 2 months." (Tr. 825; Tr. 44).
- 4 • July 2009: Dr. Maria Janout noted Mr. Danley reported having  
5 four seizures in the past two months. (Tr. 800; Tr. 44,  
6 referring to Exhibit 37F).
- 7 • August 2009: Amy Gregg PA-C noted Mr. Danley brought a  
8 seizure log of the last four months, in which he describes  
9 each of the four seizures. In his seizure log, Mr. Danley  
10 suggests two of the four seizures may or may not have been  
11 a seizure and gives possible alternative explanations.  
12 (Tr. 236-238, 818; Tr. 23 referring to Exhibit 40F).
- 13 • In November 2009, Amy Gregg PA-C noted Mr. Danley had two  
14 possible seizures and one typical seizure since his last  
15 visit, but Mr. Danley felt his seizures are mild at this  
16 point and infrequent. (Tr. 885-86; Tr. 24, referring to  
17 Exhibit 44F).
- 18 • January 29, 2010: Ms. Gregg states the "best [she] can tell  
19 from reviewing his records" Mr. Danley "appears to have  
20 approximately one seizure per month while on Depakote."  
21 (Tr. 892).

22 As is clear from the parallel citations provided above, almost  
23 all of Mr. Danley's extensive history of variable reporting was  
24 either directly noted by the ALJ in his opinion or incorporated  
25 by reference to the medical examiner's testimony. Hence, Ms.  
26 Gregg's statement was appropriately discounted.

27 *b. Harmless Error*  
28

1 If indeed an error exists within the ALJ's opinion, it was  
2 inconsequential to the ultimate nondisability determination, and  
3 therefore harmless. See *Stout v. Comm'r, Soc. Sec. Admin.*, 454  
4 F.3d 1050 (9<sup>th</sup> Cir. 2006); See also *Burch*, 400 F.3d at 682;  
5 *Matthews*, 10 F.3d at 681; *Curry*, 925 F.2d at 1131; *Booz*, 734  
6 F.2d at 1379-80; *Brawner v. Sec'y of Health & Human Servs.*, 839  
7 F.2d 432, 434 (9<sup>th</sup> Cir. 1988). A reviewing court can consider a  
8 silent disregard of lay testimony harmless error if it can  
9 confidently conclude no reasonable ALJ, when fully crediting the  
10 evidence, could have reached a different disability  
11 determination. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050  
12 (9<sup>th</sup> Cir. 2006).

13 No reasonable ALJ, even if fully crediting the letter Ms.  
14 Gregg wrote on January 29, 2010, could have reached a different  
15 disability determination. In order to reach a different  
16 disability determination, the ALJ would have to conclude Mr.  
17 Danley had been compliant with his medications for at least  
18 three months from August 4, 2009, to January 21, 2010, and  
19 during those same three months he had more than one seizure per  
20 month. In addition to reaching this conclusion (in opposition  
21 to the overwhelming patterns of varying compliance and varying  
22 frequency to the contrary) the ALJ would also need to reach this  
23 conclusion despite the one piece of relevant medical evidence  
24 during this time period: a November 2009 visit with Ms. Gregg.  
25 (Tr. 885).

26 Regarding this visit, Ms. Gregg noted Mr. Danley was no  
27 longer taking his prescribed Gabapentin for pain because he  
28

1 claimed it made him moody. (Tr. 885). There is nothing in the  
2 record to indicate Mr. Danley consulted with his treating  
3 physician before he stopped taking his prescribed pain  
4 medication. Additionally, Ms. Gregg noted Mr. Danley claims he  
5 had two "episodes" since his last visit, in August 2009, that  
6 seemed "a little different." (Tr. 885). When describing one of  
7 these "episodes" Mr. Danley stated he was sitting at the kitchen  
8 table and could no longer comprehend things for approximately  
9 five minutes. (Tr. 885). Although Mr. Danley became  
10 unresponsive during this time period, he remained conscious, and  
11 walked around the house with the help of his fiancé. (Tr. 885).  
12 There was no shaking or convulsing associated with this  
13 "episode." (Tr. 885). Additionally, Mr. Danley reported one  
14 typical seizure since August 2009. (Tr. 885). Ultimately, Ms.  
15 Gregg opined:

16 We discussed the balance of seizure control and side  
17 effects. **Depakote is the only seizure medication that**  
18 **he will allow us to use. He does not want to increase**  
19 **his dose.** He has had side effects at higher doses. I  
20 let him know that there are a few other medications he  
21 has never been on, including felbatol, phenobarbital,  
22 pregabalin and lacosamide. **He has no interest in**  
23 **trying other medications.** He makes a point that he is  
24 on a higher dose of Depakote now than he was just prior  
25 to his initial consultation with Dr. Powell, when he  
26 had multiple severe seizures. **He feels that his**  
27 **seizures are mild at this point and infrequent.** He is  
28 not having side effects on his current dose of  
Depakote. He is actually quite content with the way  
things are right now. Therefore no changes are being  
made.

(Tr. 886) (emphasis added).

Specifically regarding frequency, the ALJ would have to  
accept Ms. Gregg's statements that the "best [she] can tell from  
reviewing his records" Mr. Danley "appears to have approximately

1 one seizure per month while on Depakote." (Tr. 892)(emphasis  
2 added). In addition to accepting this statement despite  
3 objective medical evidence, extensive medical records, and Ms.  
4 Gregg's own treatment records to the contrary, the ALJ would  
5 also have to liberally construe Ms. Gregg's statement. In order  
6 to satisfy Listing 11.02's frequency requirement, Mr. Danley  
7 seizures must occur "*more frequently than once a month.*" By the  
8 plain reading of Listing 11.02, having "approximately one  
9 seizure per month" is not sufficient to satisfy the requirements  
10 that seizures occur "*more frequently than once a month.*"

### 11 III. Mr. Danley's Credibility

12 To further aid in weighing the conflicting medical  
13 evidence, the ALJ evaluated Mr. Danley's credibility and found  
14 him less than fully credible. (Tr. 19). Specifically, the ALJ  
15 noted Mr. Danley's testimony at the hearing that his seizures  
16 occur at least once a month and his reports to medical sources  
17 contradict one another. (Tr. 20). Mr. Danley contends the ALJ  
18 erred in not crediting Mr. Danley's own testimony regarding the  
19 frequency and severity of his seizures. (ECF No. 18 at 10-18).

20 Credibility determinations bear on evaluations of medical  
21 evidence when an ALJ is presented with conflicting medical  
22 opinions or inconsistency between a claimant's subjective  
23 complaints and diagnosed condition. See *Webb v. Barnhart*, 433  
24 F.3d 683, 688 (9<sup>th</sup> Cir. 2005). It is the province of the ALJ to  
25 make credibility determinations. *Andrews v. Shalala*, 53 F.3d  
26 1035, 1039 (9<sup>th</sup> Cir. 1995). However, the ALJ's findings must be  
27 supported by specific cogent reasons. *Rashad v. Sullivan*, 903  
28

1 F.2d 1229, 1231 (9<sup>th</sup> Cir. 1990). Once the claimant produces  
2 medical evidence of an underlying medical impairment, the ALJ  
3 may not discredit testimony as to the severity of an impairment  
4 because it is unsupported by medical evidence. *Reddick v.*  
5 *Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998). Absent affirmative  
6 evidence of malingering, the ALJ's reasons for rejecting the  
7 claimant's testimony must be "clear and convincing." *Lester v.*  
8 *Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). "General findings are  
9 insufficient: rather the ALJ must identify what testimony is not  
10 credible and what evidence undermines the claimant's  
11 complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d  
12 915, 918 (9<sup>th</sup> Cir. 1993).

13 The ALJ relied on several factors when he assessed Mr.  
14 Danley's credibility: inconsistent statements regarding  
15 frequency of his seizures; repeated failure to follow  
16 recommended courses of treatment; and activities inconsistent  
17 with the degree of impairment alleged. (Tr. 17-25).

18 The ALJ's reasons are clear, convincing, and supported by  
19 substantial evidence. Mr. Danley has a long history of  
20 inconsistently reporting the frequency of his seizures. The ALJ  
21 noted Mr. Danley "testified at the hearing that his seizures  
22 occur at least once a month, but his testimony and reports to  
23 medical sources contradict each other." (See above for a  
24 complete overview of Mr. Danley's history of variable  
25 reporting).

26 Likewise, Mr. Danley has an extensive history of non-  
27 compliance with prescribed medications. The ALJ noted "[t]he  
28



1 evidence indicates that his issues with medication overuse and  
2 compliance are material to the frequency of his seizures." (Tr.  
3 24). Ultimately, the ALJ concluded "the claimant's statements  
4 concerning the intensity, persistence and limiting effect of  
5 these symptoms are not credible to the extent they are  
6 inconsistent" with the residual functional capacity assessment.  
7 (Tr. 20). In addition to Mr. Danley's noted history of  
8 noncompliance with prescribed medications, the ALJ also pointed  
9 out Mr. Danley has repeatedly not complied with physical therapy  
10 recommendations from his treating physicians. (Tr. 21-22).

11 Finally, the ALJ noted Mr. Danley's actions and reports to  
12 medical personnel are inconsistent with the degree of impairment  
13 alleged. The ALJ noted Mr. Danley stated in his Function Report  
14 he has no problems with personal care, prepares simple meals  
15 daily, performs light household chores such as making the bed  
16 and doing the laundry, goes fishing, mows the lawn, and drives a  
17 vehicle. (Tr. 17). The ALJ took particular issue with Mr.  
18 Danley's insistence on the frequency and severity of his  
19 seizures, yet "the claimant continues to drive." (Tr. 21).

20 Hence, the ALJ's reasons for finding plaintiff less than  
21 fully credible are clear, convincing, and fully supported by the  
22 record. See *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir.  
23 2002) (proper factors include inconsistencies in plaintiff's  
24 statements, inconsistencies between statements and conduct, and  
25 extent of daily activities). Noncompliance with medical care or  
26 unexplained or inadequately explained reasons for failing to  
27 seek medical treatment also cast doubt on a claimant's  
28

1 subjective complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v.*  
2 *Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989).

3 In summary, the ALJ is responsible for reviewing the  
4 evidence and resolving conflicts or ambiguities in testimony.  
5 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). It is  
6 the role of the trier of fact, not this court, to resolve  
7 conflicts in evidence. *Richardson*, 402 U.S. at 400. This court  
8 has a limited role in determining whether the ALJ's decision is  
9 supported by substantial evidence and may not substitute its own  
10 judgment for that of the ALJ, even if it might justifiably have  
11 reached a different result upon de novo review. 42 U.S.C. § 405  
12 (g).

13 There is no error in the ALJ's assessment of the evidence  
14 with respect to the requirements of Listing 11.02.

15 **B. Residual Functional Capacity**

16 Once the sequential analysis has reached step five, in  
17 order to support a conclusion that an individual is not  
18 disabled, the Social Security Administration must provide  
19 evidence that demonstrates other work exists in significant  
20 numbers in the national economy that the claimant can do, given  
21 the claimant's residual functional capacity. There are two ways  
22 the ALJ can meet this burden: (1) by the testimony of a  
23 vocational expert or (2) by reference to the Medical-Vocational  
24 Guidelines (the Grids), at 20 C.F.R. pt. 404, subpt. P, app. 2.  
25 See *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9<sup>th</sup> Cir. 1999). In  
26 cases where the guidelines are "not fully applicable," the ALJ  
27 may meet his burden at step five by propounding to a vocations  
28

1 expert a hypothetical record reflecting all of the claimant's  
2 limitations. See *Roberts v. Shalala*, 66 F.3d 179, 184 (9<sup>th</sup> Cir.  
3 1995); *Magallanes v. Bowen*, 881 F.2d 747, 756-57 (9<sup>th</sup> Cir. 1989).  
4 The ALJ's hypothetical given to the VE will be affirmed so long  
5 as it contains all the limitations which the ALJ finds credible  
6 and supported by substantial evidence. *Bayliss v. Barnhart*, 427  
7 F.3d 1211, 1217-18 (9<sup>th</sup> Cir. 2005); *Magallanes v. Bowen*, 881 F.2d  
8 747, 756-57 (9<sup>th</sup> Cir. 1989). It is proper for the ALJ to limit a  
9 hypothetical to only those restrictions which are supported by  
10 substantial evidence in the record. See *Magallanes*, 881 F.2d at  
11 756-57 (9<sup>th</sup> Cir. 1989).

12 Mr. Danley alleges the ALJ erred in step five of the  
13 sequential evaluation process when he determined Mr. Danley  
14 could perform work that exists in the national economy. (ECF  
15 No. 18 at 10-18). Specifically, Mr. Danley argues the ALJ did  
16 not properly weigh the opinion of his treating physician, Dr.  
17 Powell, who noted Mr. Danley could not work at all while he was  
18 having a seizure. (ECF No. 18 at 14, 7-16). Furthermore, Mr.  
19 Danley states the ALJ improperly relied upon the medical hearing  
20 testimony and the RFC assessments completed by state agency  
21 evaluators: Dr. Haynes, Dr. Bailey, and Dr. Wolfe. (ECF No. 21  
22 at 2 at 4-6). "Mr. Danley believes that these opinions should  
23 not have been given any weight." (ECF No. 21 at 2, 4-6).

24 The ALJ properly relied on Mr. Danley's medical records,  
25 the hearing testimony of the medical examiner and the vocational  
26 expert, and the RFC assessments when determining Mr. Danley had  
27 the residual functional capacity to perform light work. With  
28

1 regards to certain medical evidence, the ALJ also properly  
2 weighed the opinions of accepted medical sources such as Dr.  
3 Powell. The ALJ concluded:

4 [T]he claimant has the residual functional capacity to  
5 perform light work as defined in 20 CFR 404.1567(b) and  
6 416.967(b) except he can occasionally balance, stoop,  
7 kneel, crouch, crawl and climb ramps or stairs, but  
8 should never climb ladders, ropes or scaffolds; he can  
9 perform occasional overhead reaching bilaterally; he  
10 should avoid concentrated exposure to extreme cold,  
11 heavy vibration, and hazards such as unprotected  
12 heights and moving machinery; he is limited to simple,  
13 one to three-step work but could perform more complex  
14 work if given additional time to learn; and he would  
15 require a break every two hours.

16 (Tr. 19)

17 The ALJ's limitations are supported by substantial  
18 evidence. The ALJ's decision laid out the foundation for each  
19 restriction and the evidence within the record supporting the  
20 limitation. (Tr. 19-25). Of particular importance, the ALJ  
21 relied on the seizure diagnosis of Dr. Powell to craft such  
22 restrictions as avoiding "unprotected heights and moving  
23 machinery," and the psychological evaluations of Drs. Capes and  
24 Mee to limite Mr. Danley "to simple, one to three-step work but  
25 could perform more complex work if given additional time to  
26 learn; and he would require a break every two hours." (Tr. 23,  
27 referring to Exhibits 22F; Tr. 19, 20, referring to Exhibits  
28 27F, 33F).

Regarding Mr. Danley's seizure limitations, the ALJ noted  
Mr. Danley's extensive history of inconsistent reporting and  
non-compliance with taking prescribed medications. See Above.  
Due to that history, the ALJ decided "the claimant's statements  
concerning the intensity, persistence and limiting effects of

1 these symptoms are not credible to the extent they are  
2 inconsistent with the above residual functional capacity." (Tr.  
3 20). Although the ALJ discounted Mr. Danley's testimony, the  
4 ALJ did appropriately credit Dr. Powell's opinion: "Dr. Powell  
5 also stated that the claimant could have to tolerate his one to  
6 two seizures per year, but noted that when he did have them, he  
7 was completely impaired." (Tr. 23, referring to Exhibit 23F).

8 The ALJ's hypothetical given to the VE will be affirmed so  
9 long as it contains all the limitations which the ALJ finds  
10 credible and supported by substantial evidence. In support of  
11 his position, Mr. Danley quotes the following section from the  
12 hearing testimony of the vocational expert:

13 Q: All right. If we assume our claimant with his age,  
14 education, training, experience, and background is  
15 able to work at the light level as that's defined  
16 in the DOT. Assume further that he's limited to  
17 occasional use of ramps or stairs; can do  
18 occasional balancing, stooping, kneeling,  
19 crouching, and crawling. He should never use  
20 ladders, ropes, or scaffolds. He can do  
21 occasional overhead reaching bilaterally. He  
22 should avoid concentrated exposure to extreme  
23 colds, heavy vibrations, and hazards such as  
24 unprotected heights, moving machinery, and the  
25 like. Assume also that he's limited to simple or  
26 one to three step work, or if its more detailed  
27 than that, that he would require additional time  
28 to learn a more complex task and that he would  
need a break about every two hours. Would he be  
able to perform any of that past work?

A: No, Your Honor.

Q: Would there be work in either the regional or  
national economies for such an individual?

A: Well, I think that person that you described in  
the hypothetical would be able to do light work,  
Your Honor, principally of an unskilled nature.  
Examples of jobs that a person with this profile  
could perform would include assembly occupations.  
There would be approximately, there would be  
approximately 21,000 jobs consistent with the  
hypothetical in the tri-state northwest region.

Q: That Washington, Idaho and Oregon?

1 A: Yes, Washington, Oregon, and Idaho. And  
2 approximately 675,000 in the national economy.

3 (Tr. 74-75).

4 Q: If we assume that our claimant was unable to tend  
5 to his work, this is during the actual workday,  
6 for one to two hours at unpredictable times, say  
7 two or three times a month, would that alter your  
8 answer?

9 A: I think that inconsistency, Your Honor, would not  
10 be tolerated by an employer in a competitive work  
11 environment over time, and it would mean that the  
12 injured worker, or the claimant would have access  
13 only to sheltered or benevolent employment.

14 (Tr. 76).

15 As is evident by the detailed hypothetical posed to the  
16 vocational expert, the ALJ included all of Mr. Danley's  
17 limitations which are supported by substantial evidence and are  
18 relevant to his ability to work. Particularly, the ALJ imposed  
19 limitations appropriate for someone who suffers from  
20 unpredictable seizures and who is incapacitated during those  
21 seizures.

22 CONCLUSION

23 Having reviewed the record and the ALJ's conclusions, this  
24 court finds the ALJ's decision is free of legal error and  
25 supported by substantial evidence.

26 IT IS ORDERED:

27 1. Defendant's Motion for Summary Judgment (ECF No. 19) is  
28 GRANTED.

1 2. Plaintiff's Motion for Summary Judgment (ECF No. 17) is  
2 DENIED.

3 The District Court Executive is directed to file this  
4 Order, provide copies to counsel for Plaintiff and Defendant,  
5  
6

1 enter judgment in favor of Defendant, and CLOSE this file.

2 DATED this 22<sup>nd</sup> Day of September 2011.

3 s/ James P. Hutton

4 JAMES P. HUTTON

5 UNITED STATES MAGISTRATE JUDGE  
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